

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTOINE L. ARDDS,

Plaintiff,

v.

KENNETH MARTIN, et al.

Defendants.

No. 2:20-cv-0133 TLN KJN P

DISCOVERY AND

SCHEDULING ORDER

Defendants V. Kieu, C. Lundgren, and J. Levin (f/k/a/ Bogacs) answered the second amended complaint. Pursuant to Federal Rules of Civil Procedure 1, 16, and 26-36, discovery shall proceed in accordance with paragraphs 1-5 of this order. In addition, the court sets a schedule for this litigation.

Should this matter proceed to trial the court will, by subsequent order, require the parties to file pretrial statements. In addition to the matters required to be addressed in the pretrial statement in accordance with Local Rule 281, plaintiff will be required to make a particularized showing in the pretrial statement in order to obtain the attendance of witnesses at trial. Plaintiff is advised that failure to comply with the procedures set forth below may result in the preclusion of any and all witnesses named in the pretrial statement.

At the trial of this case, the plaintiff must be prepared to introduce evidence to prove each of the alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of

1 trial evidence: (1) exhibits; and (2) the testimony of witnesses. It is the plaintiff's responsibility
2 to produce all of the evidence to prove the case, whether that evidence is in the form of exhibits
3 or witness testimony. If the plaintiff wants to call witnesses to testify, plaintiff must follow
4 certain procedures to ensure that the witnesses will be at the trial and available to testify.

5 I. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to
6 Testify Voluntarily

7 An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot
8 come to court unless this court orders the warden or other custodian to permit the witness to be
9 transported to court. This court will not issue such an order unless it is satisfied that:

- 10 1. The prospective witness is willing to attend;
11 and
12 2. The prospective witness has actual knowledge of relevant facts.

13 With the pretrial statement, a party intending to introduce the testimony of incarcerated
14 witnesses who have agreed voluntarily to attend the trial must serve and file a written motion for
15 a court order requiring that such witnesses be brought to court at the time of trial. The motion
16 must:

- 17 1. State the name, prisoner identification number, and address of each such
18 witness; and
19 2. Be accompanied by affidavits showing that each witness is willing to testify
20 and that each witness has actual knowledge of relevant facts.

21 The willingness of the prospective witness can be shown in one of two ways:

- 22 1. The party can swear by affidavit that the prospective witness has informed the
23 party that he or she is willing to testify voluntarily without being subpoenaed. The
24 party must state in the affidavit when and where the prospective witness informed
25 the party of this willingness;

26 Or

- 27 2. The party can serve and file an affidavit sworn to by the prospective witness, in
28 which the witness states that he or she is willing to testify without being

subpoenaed.

The prospective witness' actual knowledge of relevant facts can be shown in one of two ways:

1. The party can swear by affidavit that the prospective witness has actual knowledge. However, this can be done only if the party has actual firsthand knowledge that the prospective witness was an eyewitness or an ear-witness to the relevant facts. For example, if an incident occurred in the plaintiff's cell and, at the time, the plaintiff saw that a cellmate was present and observed the incident, the plaintiff may swear to the cellmate's ability to testify.

Or

2. The party can serve and file an affidavit sworn to by the prospective witness in which the witness describes the relevant facts to which the prospective witness was an eye- or ear-witness. Whether the affidavit is made by the plaintiff or by the prospective witness, it must be specific about what the incident was, when and where it occurred, who was present, and how the prospective witness happened to be in a position to see or to hear what occurred at the time it occurred.

The court will review and rule on the motion for attendance of incarcerated witnesses, specifying which prospective witnesses must be brought to court. Subsequently, the court will issue the order necessary to cause the witness' custodian to bring the witness to court.

II. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to Testify Voluntarily

If a party seeks to obtain the attendance of incarcerated witnesses who refuse to testify voluntarily, the party should submit with the pretrial statement a motion for the attendance of such witnesses. Such motion should be in the form described above. In addition, the party must indicate in the motion that the incarcerated witnesses are not willing to testify voluntarily.

III. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to Testify Voluntarily

It is the responsibility of the party who has secured an unincarcerated witness' voluntary

1 attendance to notify the witness of the time and date of trial. No action need be sought or
2 obtained from the court.

3 IV. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
4 Testify Voluntarily

5 If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, not
6 earlier than four weeks and not later than two weeks before trial, the party must prepare and
7 submit to the United States Marshal a subpoena for service by the Marshal upon the witness.
8 (Blank subpoena forms may be obtained from the Clerk of the Court). Also, the party seeking the
9 witness' presence must tender an appropriate sum of money to the witness through the United
10 States Marshal. In the case of an incarcerated witness, the appropriate sum of money is the
11 daily witness fee of \$40.00 plus the witness' travel expenses.

12 A subpoena will not be served by the United States Marshal upon an incarcerated
13 witness unless the subpoena is accompanied by a money order made payable to the witness for
14 the full amount of the witness' travel expenses plus the daily witness fee of \$40.00. As noted
15 earlier, because no statute authorizes the use of public funds for these expenses in civil cases, the
16 tendering of witness fees and travel expenses is required even if the party was granted leave to
17 proceed in forma pauperis.

18 With respect to the filing of dispositive motions, the parties should keep in mind that the
19 purpose of law and motion is to narrow and refine the legal issues raised by the case, and to
20 dispose of by pretrial motion those issues that are susceptible to resolution without trial. To
21 accomplish that purpose, the parties need to identify and fully research the issues presented by the
22 case, and then examine those issues in light of the evidence gleaned through discovery. If it
23 appears after examining the legal issues and facts that an issue can be resolved by pretrial motion,
24 the parties are to file the appropriate motion by the law and motion cutoff set forth below.

25 All purely legal issues are to be resolved by timely pretrial motion. The parties are
26 reminded that motions in limine are procedural devices designed to address the admissibility of
27 evidence. The parties are cautioned that the court will look with disfavor upon substantive
28 motions presented in the guise of motions in limine at the time of trial.

1 Good cause appearing, IT IS HEREBY ORDERED that:

2 1. Discovery requests shall be served by the party seeking the discovery on all parties to
3 the action.¹ Discovery requests shall not be filed with the court except when required by Local
4 Rules 250.1, 250.2, 250.3 and 250.4.

5 2. Responses to written discovery requests shall be due forty-five days after the request is
6 served.

7 3. The parties are cautioned that filing of discovery requests or responses, except as
8 required by rule of court, may result in an order of sanctions, including, but not limited to, a
9 recommendation that the action be dismissed or the answer stricken.

10 4. Pursuant to Federal Rule of Civil Procedure 30(a)(2)(B), defendants may depose, either
11 in person or by videoconference, plaintiff and any other witness confined in a prison or jail upon
12 condition that, at least fourteen days before such a deposition, defendants serve all parties with
13 the notice required by Fed. R. Civ. P. 30(b)(1). Pursuant to Rule 30(b)(4), the parties may take
14 any deposition by video conference, relieving the court reporter of the requirement to be in the
15 physical presence of the witness under Rule 28(a)(1) during that deposition.

16 5. If disputes arise about the parties' obligations to respond to requests for discovery, the
17 parties shall comply with all pertinent rules including Rules 5, 7, 11, 26, and 37 of the Federal
18 Rules of Civil Procedure and Rules 134, 135, 130, 131, 110, 142, and 230(l) of the Local Rules of
19 Practice for the United States District Court, Eastern District of California; unless otherwise
20 ordered, Local Rule 251 shall not apply. Filing of a discovery motion that does not comply with
21 all applicable rules may result in imposition of sanctions, including but not limited to denial of the
22 motion.

23 6. The parties may conduct discovery until **September 28, 2023**. Any motions necessary
24 to compel discovery shall be filed by that date. All requests for discovery pursuant to Federal
25 Rules of Civil Procedure 31, 33, 34 or 36 shall be served not later than sixty days prior to that
26 date.

27 ¹ If an attorney has filed a document with the court on behalf of any defendant, then plaintiff must
28 serve documents on that attorney and not on the defendant. See Fed. R. Civ. P. 5(b).

1 7. All pretrial motions, except motions to compel discovery, shall be filed on or before
2 **December 28, 2023**. Unless otherwise ordered, all motions to dismiss, motions for summary
3 judgment, motions concerning discovery, motions pursuant to Federal Rules of Civil Procedure 7,
4 11, 12, 15, 41, 55, 56, 59 and 60, and Local Rule 110, shall be briefed pursuant to Local Rule
5 230(l). Failure to timely oppose such a motion may be deemed a waiver of opposition to the
6 motion. L.R. 230(l). Unsigned affidavits or declarations will be stricken, and affidavits or
7 declarations not signed under penalty of perjury have no evidentiary value. Opposition to all
8 other motions need be filed only as directed by the court.

9 8. If plaintiff is released from prison while this case is pending, any party may request
10 application of the other provisions of Local Rule 230 in lieu of Local Rule 230(l). Until such a
11 motion is granted, Local Rule 230(l) will govern all motions described in paragraph 7 above
12 regardless of plaintiff's custodial status. L.R. 102(d).

13 9. Each party proceeding without counsel shall keep the court informed of a current
14 address at all times while the action is pending. Any change of address must be reported
15 promptly to the court in a separate document captioned for this case and entitled "Notice of
16 Change of Address." A notice of change of address must be properly served on other parties.
17 Service of documents at the address of record for a party is fully effective. L.R. 182(f). A party's
18 failure to inform the court of a change of address may result in the imposition of sanctions
19 including dismissal of the action.

20 10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), and
21 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), the court hereby informs plaintiff of the
22 following requirements for opposing a motion for summary judgment pursuant to Federal Rule of
23 Civil Procedure 56. Such a motion is a request for an order for judgment in favor of the
24 defendant without trial. A defendant's motion for summary judgment will set forth the facts that
25 the defendant contends are not reasonably subject to dispute and that entitle the defendant to
26 judgment. To oppose a motion for summary judgment, plaintiff must show proof of his or her
27 claims. Plaintiff may do this in one or more of the following ways. Plaintiff may rely on
28 plaintiff's statements made under penalty of perjury in the complaint if the complaint shows that

1 plaintiff has personal knowledge of the matters stated and plaintiff specifies those parts of the
 2 complaint on which plaintiff relies. Plaintiff may serve and file one or more affidavits or
 3 declarations setting forth the facts that plaintiff believes prove plaintiff's claims; the person who
 4 signs an affidavit or declaration must have personal knowledge of the facts stated. Plaintiff may
 5 rely on written records, but plaintiff must prove that the records are what plaintiff asserts they are.
 6 Plaintiff may rely on all or any part of the transcript of one or more depositions, answers to
 7 interrogatories, or admissions obtained in this proceeding. If plaintiff fails to contradict the
 8 defendant's evidence with counter-affidavits or other admissible evidence, the court may accept
 9 defendant's evidence as true and grant the motion. If there is some good reason why such facts
 10 are not available to plaintiff when required to oppose a motion for summary judgment, the court
 11 will consider a request to postpone consideration of the defendant's motion. Fed. R. Civ. P.
 12 56(d). If plaintiff does not serve and file a written opposition to the motion, or a request to
 13 postpone consideration of the motion, the court may consider the failure to act as a waiver of
 14 opposition to the defendant's motion. L.R. 230(l). If the court grants the motion for summary
 15 judgment, whether opposed or unopposed, judgment will be entered for the defendant without a
 16 trial and the case will be closed as to that defendant.

17 11. If defendant moves for summary judgment, defendant must contemporaneously serve
 18 with the motion, but in a separate document, a copy of the attached Rand Notice. See Woods v.
 19 Carey, 684 F.3d 934, 935 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998).
 20 **Failure to do so may constitute grounds for denial of the motion.**

21 12. On April 3, 2014, the United States Court of Appeals for the Ninth Circuit overruled
 22 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003), with respect to the proper procedural
 23 device for raising the issue of administrative exhaustion. Albino v. Baca, 747 F.3d 1162, 1166
 24 (9th Cir. 2014) (en banc). Following the decision in Albino, a defendant may raise the issue of
 25 exhaustion in either (1) a motion to dismiss pursuant to Rule 12(b)(6), in the rare event the failure
 26 to exhaust is clear on the face of the amended complaint, or (2) a motion for summary judgment.
 27 Albino, 747 F.3d at 1166, 1169-70 (quotation marks omitted). An unenumerated Rule 12(b)
 28 motion is no longer the proper procedural device for raising the issue of exhaustion. Albino, 747

1 F.3d at 1168. The court encourages defendant to bring motions raising exhaustion issues early in
2 the case. Id. at 1170-71.

3 13. Unsigned affidavits or declarations will be stricken, and affidavits or declarations not
4 signed under penalty of perjury have no evidentiary value.


5 14. Pretrial conference and trial dates will be set, as appropriate, following adjudication
6 of any dispositive motion, or the expiration of time for filing such a motion.

7 15. The Clerk of the Court shall serve on plaintiff a copy of the Local Rules of Court.

8 16. The Clerk of the Court is directed to send the parties the court's notice regarding
9 expedited trial setting procedures upon consent to magistrate judge jurisdiction.

10 17. The failure of any party to comply with this order, the Federal Rules of Civil
11 Procedure, or the Local Rules of Court, may result in the imposition of sanctions including, but
12 not limited to, dismissal of the action or entry of default. See Fed. R. Civ. P. 41(b).

13 Dated: May 22, 2023

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15 KENDALL J. NEWMAN
16 UNITED STATES MAGISTRATE JUDGE
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Rand Notice to Plaintiff

This notice is provided to ensure that you, a pro se prisoner plaintiff, “have fair, timely and adequate notice of what is required” to oppose a motion for summary judgment. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998). The court requires that you be provided with this notice regarding the requirements for opposing a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

When a defendant moves for summary judgment, the defendant is requesting that the court grant judgment in defendant’s favor without a trial. If there is no real dispute about any fact that would affect the result of your case, the defendant who asked for summary judgment is entitled to judgment as a matter of law, which will end your case against that defendant. A motion for summary judgment will set forth the facts that the defendant asserts are not reasonably subject to dispute and that entitle the defendant to judgment.

To oppose a motion for summary judgment, you must show proof of your claims.² To do this, you may refer to specific statements made in your complaint if you signed your complaint under penalty of perjury and if your complaint shows that you have personal knowledge of the matters stated. You may also submit declarations setting forth the facts that you believe prove your claims, as long as the person who signs the declaration has personal knowledge of the facts stated. You may also submit all or part of deposition transcripts, answers to interrogatories, admissions, and other authenticated documents. For each of the facts listed in the defendant’s Statement of Undisputed Facts, you must admit the facts that are undisputed, and deny the facts that are disputed. If you deny a fact, you must cite to the proof that you rely on to support your denial. See L.R. 260(b). If you fail to contradict the defendant’s evidence with your own evidence, the court may accept the defendant’s evidence as the truth and grant the motion.

The court will consider a request to postpone consideration of the defendant’s motion if you submit a declaration showing that for a specific reason you cannot present such facts in your opposition. If you do not respond to the motion, the court may consider your failure to act as a waiver of your opposition. See L.R. 230(l).

If the court grants the defendant’s motion, whether opposed or unopposed, judgment will be entered for that defendant without a trial and the case will be closed as to that defendant.

² If the motion for summary judgment concerns the exhaustion of administrative remedies, you must submit proof of specific facts regarding the exhaustion of administrative remedies. See Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012); Albino v. Baca, 747 F.3d 1162 (9th Cir. April 3, 2014).